Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

EAST-WEST TOWING COMPANY, INC. and
VANGUARD INSURANCE COMPANY,
Petitioner,

versus

AVONDALE SHIPYARD, INC.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Company

QUESTIONS PRESENTED

Petitioners present for review the following issue:

1. Whether the Fifth Circuit's allowing the stronger party to a towage contract to enforce contractual and quasi-contractual indemnity rights violates the rules of law set forth by this court in ***Stevens v. The WHITE CITY*** and ***Bisso v. Inland Waterways Corp.***

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, East-West Towing Company, Inc. and Vanguard Insurance Company, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in these proceedings on July 6, 1981.

OPINIONS BELOW

The opinion of the Fifth Circuit entered on July 6, 1981, is reprinted at 649 F.2d 1104 (5th Cir. 1981). It is reprinted in Appendix A hereto at page la, *infra*. Rehearing and Rehearing En Banc were denied on August 24, 1981.

The District Court for the Eastern District of Louisiana issued an opinion on April 23, 1979, which was reported at 470 F. Supp. 484 (E.D. La. 1979). The District Court's decision is reprinted in Appendix B hereto at page 18a, *infra.*

JURISDICTION

The judgment of the Fifth Circuit was rendered on July 6, 1981. Rehearing and Rehearing En Banc were denied on August 24, 1981, as reprinted in Appendix C hereto at page 32a, *infra.*

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Petitioners present for review the following issue:

1. Whether the Fifth Circuit's allowing the stronger party to a towage contract to enforce contractual and quasi-contractual indemnity rights violates the rules of law set forth by this court in *Stevens v. The WHITE CITY* and *Bisso v. Inland Waterways Corp.*

STATEMENT OF THE CASE

A. Facts necessary to argument of the issues.

On January 1, 1971, the Barge W-102 was bareboat chartered to Avondale Shipyards, Inc. (Avondale) from its owner, Central Marine Service, Inc. (Central Marine). On

February 4, 1974, the day of the accident out of which this litigation arose, Robert Stevens was employed by East-West Towing, Inc. (East-West) as a mate/wheelman aboard its tug M/V DELTA DAWN, which was under oral contract to Avondale for use primarily in shifting barges at Avondale's facility on the Mississippi River at Westwego, Louisiana. At that time, Avondale was using the Barge W-102 as a work barge and had situated a small, mobile, "cherry picker" crane aboard her. In order to secure the crane to the barge, Avondale had placed metal frames over the crane's hydraulic "feet" and welded these to the deck. The accident occurred shortly after Stevens had secured a line from the tug to one of the metal frames in an attempt to "hip up" the M/V DELTA DAWN alongside the barge. Her lines became taut and tore the metal frame loose, which resulted in the line and the frame popping back and striking the right side of Stevens' head, thereby causing serious injury.

B. Course of proceedings and disposition of the case.

Robert Stevens subsequently filed this personal injury suit against his employer, East-West; its insurer, Vanguard Insurance Co. (Vanguard); Avondale and Central Marine. Cross-claims and third-party claims for indemnity and contribution were then filed by East-West and Vanguard against Avondale and Central Marine, and vice-versa.

Realizing their potential liability to Mr. Stevens, East-West and Vanguard compromised his claim against them, made a reasonable settlement payment on April 9, 1976, and in turn received an irrevocable assignment of his claims against Avondale and Central Marine.

By agreement of the parties, the case was submitted to the district court on depositions, documents and briefs. On April 27, 1979, the Honorable Fred J. Cassibry found that: (1) Central Marine was not liable because under the bareboat charter Avondale was the owner pro hac vice at the time of the casualty; (2) the Barge W-102 was unseaworthy due to its bitts and cleats being unsafe and in disrepair and/or absent; (3) Avondale's failure to remedy the unseaworthy condition after notification was negligence; (4) the knowledge of the missing bitts and cleats by Avondale's shipfitter foreman was sufficient privity on Avondale's part to require denial of its claim to limitation of liability; (5) the principles of last clear chance, the warranty of workmanlike performance, and the duty of a tug to a tow did not relieve Avondale of liability; (6) East-West was negligent; (7) the liability should be divided equally between Avondale and East-West; (8) the $200,000.00 settlement by East-West was not excessive, and (9) East-West was therefore entitled to recover from Avondale $100,000.00 plus one-half of the costs.

Vanguard then moved the district court to supplement the record so as to allow introduction into evidence of documents pertaining to maintenance and cure payments made to and for the benefit of Robert Stevens as well as documents evidencing tender of the settlement ultimately consummated on April 9, 1979; and to alter or amend the judgment so as to permit recovery by Vanguard of 50% of the maintenance and cure payments made to Robert Stevens and recovery by Vanguard of pre-judgment interest at the rate of 7% from April 9, 1976, on the amount of its principal recovery. The district court denied these motions on July 10, 1979.

Both Vanguard and Avondale then timely filed notices of appeal, and after briefing and oral argument, the attached opinion was issued by a panel of the Fifth Circuit. In short, the Fifth Circuit concluded that Avondale was not negligent and the Barge W-102 was not unseaworthy, and that even if negligence and/or unseaworthiness were attributable to Avondale, Avondale would be allowed to recover indemnity from East-West on the basis of a breach of an implied warranty of workmanlike performance arising from the contract of towage. East-West and Vanguard then filed petitions for rehearing and rehearing en banc with respect to the holding that Avondale was entitled to recover indemnity on the basis of the existence and breach of a warranty of workmanlike performance. Both petitions were denied on August 24, 1981, as reprinted herein at page 32a, *infra*.

ARGUMENT

I.

The Fifth Circuit's Allowing Contractual and Quasi-Contractual Indemnity Violates *Stevens v. The WHITE CITY* Which Held That Suits Between Tug and Tow Sound Only In Tort

Quite simply, in *Stevens v. The WHITE CITY*, 285 U.S. 195 (1932), this Honorable Court declared that "[i]t has long been settled that suit by the owner of a tow (Avondale in this case) against her tug (the M/V DELTA DAWN) to recover for an injury to the tow caused by negligence on the part of the tug is a suit ***ex delicto*** and not ***ex contractu***." 285 U.S., at 201. Because Avondale is

using its alleged indemnity right as a defense to plaintiff's (through East-West's) claim, it is clear that the Fifth Circuit wrongly allowed Avondale a non-tortious, quasi-contractual right of recovery. That these alleged rights are asserted in defense herein is of no moment, as correctly noted by the Fifth Circuit at page 1108 of its decision, which is reprinted herein at page 18a, *infra*.

Inasmuch as the instant suit is therefore in effect one by a tow against its tug, it is apparent that this Honorable Court's *WHITE CITY* decision is applicable and that only tortious, and not contractual, remedies are available to Avondale. Further, there can be no doubt but that what a party is prohibited from recovering by express contract it cannot recover by quasi or implied contract. Therefore, the warranty of workmanlike performance, being a quasi-contractual remedy, is not available to Avondale, and the Fifth Circuit was also in error in this regard.

II.

The Fifth Circuit's Allowing Enforcement of Contractual and Quasi-Contractual Indemnity Provisions by the Stronger Party to a Towage Contract Violates the Rule of *Bisso v. Inland Waterways Corp.*

In case after case after case, this Honorable Court has declared unenforceable attempts by the stronger party to a towage contract to include indemnity clauses therein excusing that party from the consequences of its own negligence. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955); *Boston Metals Co. v. SS WINDING GULF*, 349 U.S. 122 (1955); *Dixilyn Drilling Corp. v. Crescent*

Towing and Salvage Company, 372 U.S. 697 (1963). The basis, petitioners submit, for this Court's position in this regard is that the party to a towage contract in the stronger bargaining position should not be allowed to overreach the party in the weaker position.

Avondale may argue that the facts presently before the Court are not analogous to those presented in the three above-cited decisions because the tow is here seeking indemnity from the tug. Though such simplistic reasoning might seem attractive at first blush, a closer examination will reveal that this is exactly the type of overreaching situation this Court sought to prevent. Surely, no one would contend that East-West Towing had any bargaining leverage whatsoever in contractual negotiations with Avondale Shipyards, Inc., one of the largest shipyards in the world and the largest employer in the State of Louisiana. Rather, it is plain that Avondale was and is able to insert whatever indemnity clauses it desires into its towage contracts, thereby putting the small towboat company in a "take it or leave it" position. Therefore, there can be no doubt but that the Fifth Circuit's ruling below is violative of this Court's holding in ***Bisso v. Inland Waterways Corp.*** and its progeny.

That no written contract existed between these parties is of no moment in that this Court's prohibition of express contractual indemnity provisions surely includes a prohibition of implied contractual indemnity agreements. Certainly, what this Court has prohibited by express contract, the Fifth Circuit cannot permit by implied contract.

CONCLUSION

The premises considered, the Fifth Circuit was in error in holding that there arose an enforceable warranty of workmanlike performance from the towage contract between Avondale Shipyards, Inc. and East-West Towing Company, Inc. because the creation and enforcement of such an implied contractual right of indemnity between those parties which excuses one of them from the consequences of its own negligence violates this Honorable Court's decisions in ***Bisso v. Inland Waterways Corp.***, ***Boston Metals Co. v. SS WINDING GULF***, ***Dixilyn Drilling Corp. v. Crescent Towing and Salvage Company***, and ***Stevens vs. The Vessel WHITE CITY***.

WHEREFORE, East-West Towing Company, Inc. and Vanguard Insurance Company pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted:

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CERTIFICATE OF SERVICE

It is hereby certified that three copies of the foregoing petition were served on John O. Charrier, Esq. of New Orleans, Louisiana this date by mailing same as required by Rule 33-1 of this Court.

New Orleans, October _____, 1981.

WINSTON EDWARD RICE

APPENDIX A

Robert STEVENS,

Plaintiff,

v.

EAST-WEST TOWING COMPANY, INC., et al.,

Defendants.

AVONDALE SHIPYARDS, INC.

Defendant-Appellant, Cross-Appellee,

v.

EAST-WEST TOWING COMPANY, INC.
and Vanguard Insurance

Defendants-Appellees, Cross-Appellants.

No. 79-2875.

United States Court of Appeals,
Fifth Circuit,
Unit A

July 6, 1981.

In admiralty case, plaintiff brought suit for personal injuries sustained while he was working as deckhand on tugboat. After employer settled plaintiff's suit and had been assigned plaintiff's claim against other defendants, the United States District Court for the Eastern District of Louisiana, at New Orleans, 470 F.Supp. 484, Fred J. Cassibry, J., tried third-party actions for contribution and indemnity and held that bareboat charterer of barge was

liable for any contribution and refused employer's request for contribution from charterer for plantiff's maintenance and cure and for prejudgment interest, and employer and charterer appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that: (1) district court's finding that bitts and cleats on river side of barge were missing was clearly erroneous; (2) charterer's failure to add cleat or bitt amidships was not a negligent omission; and (3) even if charterer was negligent or its barge unseaworthy, it could successfully defend against any liability because employer breached its warranty of workmanlike performance.

Reversed.

1. Admiralty 118.7(5)

In admiralty case, district judge's findings of fact concerning seaworthiness and negligence may not be set aside unless clearly erroneous.

2. Admiralty 118.7(1)

In admiralty case tried on "cold record" consisting entirely of depositions and documents, burden of proving district court's findings clearly erroneous is to some extent ameliorated.

3. Seamen 9

Vessel is "unseaworthy" if it and its appurtenances are not reasonably fit for their intended use; standard is not perfection but reasonable fitness, not a ship that will weather every conceivable storm, but vessel reasonably suited for her intended service.

See publication Words and Phrases for other judicial constructions and definitions.

4. Seamen 29(5.14)

In admiralty case, district court's finding that barge was unseaworthy because it was missing bitts and cleats necessary to tie up and to tow barge was clearly erroneous, since three sets of photographs taken within 24 hours of accident proved that barge had its full complement of bitts and cleats on river side, despite testimony of crane operator who stated he could remember only one bitt standing but that his memory was unclear.

5. Seamen 29(5.14)

In admiralty case, since photographic exhibits showed that bitts and cleats were in fact not missing from barge, bareboat charterer of barge could not be held negligent on ground that they were.

6. Seamen 9

In admiralty case, it was error to hold that barge was unseaworthy because bareboat charterer of barge had failed to provide additional bitt or cleat amidships to accommodate captain who had preference for "hip-tow" barge, or towing it sideways, where bitts and cleats on barge were eminently fit, as placed, to tie up to the barge, and barge's bitt and cleat placement conformed to its blueprints.

7 Seamen 29(2)

In admiralty case, bareboat charterer of barge could not be held liable on ground that barge had holes in its deck

and that charterer was negligent in failing to repair barge, absent suggestion that holes were proximate cause of plaintiff's injuries.

8. Seamen 29(5.4)

Even if lack of cleat or bitt directly amidships made barge unseaworthy or if failure of bareboat charterer of barge to add cleat or bitt amidships was a negligent omission, charterer could successfully defend against liability for injury sustained by plaintiff who, while working aboard tug, improperly tied bow line to "stop plate" on barge and was injured when stop plate snapped and whipped back and struck plaintiff, since plaintiff's employer breached its warranty of workmanlike performance.

John O. Charrier, Jr., New Orleans, La., for defendant-appellant, cross-appellee.

Phelps, Dunbar, Marks, Claverie & Sims, Winston Edward Rice, New Orleans, La., for defendants-appellees, cross-appellants.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before GOLDBERG, AINSWORTH and RUBIN, Circuit Judges.

AINSWORTH, Circuit Judge:

In this admiralty case, plaintiff Robert Stevens brought suit for personal injuries sustained February 4, 1974, while

he was working as a deckhand on the tugboat DELTA DAWN at the Westwego facility of Avondale Shipyards, Inc. (Avondale) on the Mississippi River. Stevens sued his employer, East-West Towing Company, Inc. (East-West), under the Jones Act, 46 U.S.C.A. § 688. He also sued Central Marine Services, Inc. (Central Marine), the owner of Barge W-102 (an appurtenance of which injured Stevens), and Avondale, the bareboat charterer of the barge, under general admiralty principles. East-West settled Stevens' suit for $200,000 and an assignment of his claim against the other defendants. The district judge tried the third party actions for contribution and indemnity among the defendants by the use of depositions and documents only, without oral argument or live testimony.

The district judge held that Central Marine was not liable to East-West, since Central Marine's bareboat charter made Avondale the owner ***pro hac vice*** of Barge W-102 for the term of the charter. No party appeals the district court's disposition of this issue. However, Avondale appeals from the trial court's decision that Barge W-102 was unseaworthy, that Avondale was negligent, and that it should contribute fifty percent, or $100,000 to East-West as its share of Stevens' damages. Likewise, East-West appeals from the district court judgment refusing East-West's request for contribution from Avondale for Stevens' maintenance and cure and for prejudgment interest. We hold that Barge W-102 was not unseaworthy, nor was Avondale negligent. Alternatively, even if Avondale was negligent or its barge unseaworthy, we hold that Avondale has asserted a complete defense against East-West: namely, that East-West breached its warranty of workmanlike per-

formance that it owed Avondale. Accordingly, we reverse the district court's judgment holding Avondale liable for any contribution.

I. FACTS

For several weeks before the accident, Barge W-102 had been used to assist in constructing the drilling rig ST. LOUIS in the Avondale shipyards. The barge had a cherry picker crane approximately amidships which was held in place by metal "saddles" resembling upside down U's welded to the deck over each of the crane's four legs. The barge worked around the three accessible sides of the ST. LOUIS, using the crane to remove material from the rig.

On February 4, 1974, the tugboat DELTA DAWN received a radio call to move Barge W-102 from the downstream side of the ST. LOUIS to the river side for the day's operations. The DELTA DAWN and her crew had moved the barge several times before February 4[1] and continued to shift it on several occasions after that date without mishap. However, on the 4th, when the tug tied onto the barge to await towing orders,[2] Stevens tied the bowline to a "stop plate" on the starboard stern or river downstream leg

1. The captain of the DELTA DAWN, Paul Verdin, stated that he moved Barge W-102 approximately one to four times a day for a week prior to the accident. Verdin Dep. at 52, 83-84.

2. Douglas Adams, an Avondale general foreman, gave Captain Verdin instructions concerning where to move the barge. However, Adams left the actual moving to the tug and its crew. Adams Dep. at 14-15.

of the crane.[3] The stop plate was manifestly not a proper place to tie up the tug. The crane operator had warned the DELTA DAWN's captain and crew on separate occasions that the stop plate could not withstand any strain. Avondale's shipfitter foreman had "chewed out" the tugboat captain and Stevens for tying up to one of the crane's saddles explaining that "hanging onto" small metal pieces was too dangerous. And the tug captain specifically ordered Stevens to untie the line from the stop plate on the day of the accident. Stevens came back aboard the tug and was standing in the bow when the current of the river moved the tug away from the barge, drew the bowline taut, and caused the stop plate to snap. The bowline whipped back with the stop plate and struck Stevens in the head causing him severe injuries.

II. STANDARD OF REVIEW

[1, 2] The district judge's findings concerning seaworthiness and negligence are normally considered findings of fact. ***Webb v. Dresser Industries, Inc.***, 536 F.2d 603, 606 (5th Cir. 1976), ***cert. denied***, 429 U.S. 1121, 97 S.Ct. 1157-58, 51 L.Ed.2d 572 (1977). Both parties agree that such findings of fact may not be set aside unless clearly erroneous. ***McAllister v. United States***, 348 U.S. 19, 20, 75 S.Ct. 6, 8, 99 L.Ed. 20 (1954); ***Webb v. Dresser Industries, Inc., supra*** at 606. Likewise, both parties agree with the Supreme Court's definition in ***McAllister*** of

3. The stop plate was a piece of metal approximately two inches wide, ten inches long and one-half inch thick "tack-welded" to the crane leg to prevent part of the hydraulic machinery from hyperextending.

the clearly erroneous standard:

> A finding is clearly erroneous when " 'although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.' " ***United States v. Oregon State Medical Society,*** 343 U.S. 326, 329, 72 S.Ct. 690, 698, 96 L.Ed. 978; ***United States v. United States Gypsum Co.,*** 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746.

348 U.S. at 20, 75 S.Ct. at 8. Finally, we note that under this circuit's jurisprudence, when a case is tried on a "cold" record consisting entirely of depositions and documents, the burden of proving the district court's findings clearly erroneous is "to some extent ameliorated." ***McKensie v. Sea Land Service, Inc.,*** 551 F.2d 91, 92 (5th Cir. 1977); ***Sicula Oceanica, S.A. v. Wilmar Marine Engineering& Sales Corp.,*** 413 F.2d 1332, 1333 (5th Cir. 1969). With or without this reduced burden of proof, the evidence leaves us with a definite and firm conviction that a mistake has been committed and that the district court's findings were clearly erroneous.

III. THE UNSEAWORTHINESS OF BARGE W-102

A. Missing Bitts and Cleats

The district court found that Barge W-102 was unseaworthy because it was missing bitts and cleats necessary to

tie up and to tow the barge.[4] The existence, number, and condition of the bitts and cleats on the river side of the barge were important issues in the case. At least ten people were asked in their depositions about the bitts and cleats on Barge W-102. A review of these depositions shows at least two things: no one could remember how many bitts and cleats were on the barge on the date of the accident, and only Killian Huger, the president of Central Marine, knew how many bitts and cleats were supposed to be on the barge. The district judge cut the Gordian knot by giving credence to the deposition testimony of the crane operator, who stated that he could remember only one bitt standing on February 4, 1974.

However, among the hundreds of pages of depositions and documents in the record, there are four exhibits which convince us that the crane operator's memory was incorrect and that the district court's finding was erroneous. Exhibit Eustis 8 is a copy of the blueprints for a barge similar to Barge W-102. They show that the barge is designed to have a double bitt at each corner and two cleats on each side, or a total of twelve cleats and bitts. On the blueprints are these words: BUILT IN ACCORDANCE WITH AMERICAN-BUREAU-OF-SHIPPING SPECIFICATIONS FOR CLASSIFICATION + A1 BARGE RIVERS, BAYS & SOUNDS. In addition, three different photographers

4. A bitt is a piece of metal affixed to the deck and resembles a large upright spool. Lines are wrapped around the narrower body of the bitt and are held in place by the wider head. Two bitts attached to the same metal plate on the deck are called a double bitt. A cleat resembles a large anvil.

took pictures of the scene within twenty-four hours of the accident. Lawrence Stepteaux, employed by Avondale, arrived very soon after the accident.[5] His seven photographs, marked ***in globo*** Exhibit 5, clearly show the double bitt and the cleat at the downstream end on the river side of the barge. Indeed, the DELTA DAWN is shown to be tied up at the downstream cleat in Stepteaux's photograph. Another of Stepteaux's photographs shows somewhat less clearly the upstream cleat and bitt. Richmond Eustis, the original attorney for East-West, visited Barge W-102 the night of February 4 and took seven photographs. Eustis 7 shows a double bitt, one side of which has a mooring line wrapped around it extending to a vessel. Eustis 2 shows another mooring line running from a vessel to a cleat on the barge. Eustis testified that #7 was the downstream double bitt and #2 was the upstream cleat. Finally, Francis Richard, employed by Central Marine, took nineteen pictures of the area on February 5, marked in the record as ***in globo*** Exhibit 6. These photographs clearly show both double bitts and both cleats on the river side of Barge W-102. Another barge is tied up to the downstream double bitt, and a man appears to be preparing to tie the DELTA DAWN to the upstream cleat.

Thus, although the deposition testimony must be considered, what is so clearly shown by the three sets of photographs taken within twenty-four hours of the accident must prevail over the witnesses' admittedly unclear memory. The photographs prove that Barge W-102 had its full complement of bitts and cleats on the river side, and thus the premise upon which the district court based its finding of unseaworthiness was clearly erroneous.

5. One of Stepteaux's photographs shows the still wet blood from the accident on the tug's deck.

B. Failure to Provide an Additional Bitt or Cleat

In its brief, East-West acknowledges the frailty of the unseaworthiness argument based on Barge W-102's missing bitts or cleats and instead suggests that the barge was unseaworthy because Avondale had failed to provide an additional bitt or cleat amidships. The captain of the DELTA DAWN had a preference for "hip-towing" the barge, or towing it sideways, and to do so he needed to tie up in the middle of the barge. East-West argues that failure to add a cleat or bitt to accommodate the captain made the barge unseaworthy.

[3, 4] A vessel is unseaworthy if it and its appurtenances are not "reasonably fit for their intended use. The standard is not perfection but reasonable fitness; not a ship that will weather every conceivable storm . . . but a vessel reasonably suited for her intended service. ***Boudoin v. Lykes Bros. S.S. Co.***, 348 U.S. 336, [339], 75 S.Ct. 383, [385], 99 L.Ed. 354 [(1955)]." ***Mitchell v. Trawler Racer, Inc.***, 362 U.S. 539, 550, 80 S.Ct. 926, 933, 4 L.Ed.2d 941 (1960). At the time of the accident, the DELTA DAWN was merely standing by, awaiting instructions to tow the barge. As the photographs put into evidence demonstrate, the bitts and cleats on the barge were eminently fit as places to tie up. As for providing a reasonably fit place for a tug to attach a line for a "hip-tow," we emphasize that a vessel does not have to have bitts and cleats to accommodate every conceivable towing method in order to be seaworthy. The DELTA DAWN had successfully moved Barge W-102 using other towing methods and had perfected hip tows by

attaching the line to the obviously more substantial crane leg. The barge's bitt and cleat placement conformed to its blueprints. Under these circumstances, it was error to hold that the barge was unseaworthy.

IV. NEGLIGENCE OF AVONDALE

The district court found "Avondale's failure to remedy the situation [missing bitts and cleats] resulted in a continuing negligent act . . . . [T]he owner is also liable for continuing negligence when, once notified, he fails to remedy the condition which renders the vessel unseaworthy."

[5, 6] Since the photographic exhibits show that the bitts or cleats were in fact not missing, Avondale cannot be held to be negligent on the grounds that they were. The district court found that Stevens, the injured DELTA DAWN deckhand, told an Avondale employee, Douglas Adams, that "there were no other places on the barge to which he could secure the lines," and held that Avondale was thus on notice that the ship was unseaworthy and was negligent for failing to correct the situation. If Stevens made such a statement, he misstated the facts.[6] Avondale cannot be found negligent for failing to correct Stevens' misconception.

6. We are unable to find in Adams' deposition any reference to such a statement by Stevens. In any event, Adams' memory of his conversation with Stevens is understandably hazy a year and a half after the event. Adams expressed reservations about the exact conversation seven times in the space of two pages of depositions. *See* Adams Dep. at 16-17.

[7] Again recognizing the tenuousness of its negligence argument based on missing cleats and bitts, East-West suggests in its brief that Barge W-102 was in a generally dilapidated condition—it had holes in its deck—and that Avondale was negligent in failing to repair the barge. This argument is meritless. No suggestion was made that the holes in the barge's deck were a proximate cause of Stevens' injuries, nor could any such suggestion be seriously advanced. Likewise, East-West's argument that the bitts and cleats on the barge were in unsound condition is conclusively refuted by the photographs in evidence showing the bitts and cleats in actual use.

V. EAST-WEST'S WARRANTY OF WORKMANLIKE PERFORMANCE

[8] We find persuasive Avondale's alternative argument that even if the lack of a cleat or bitt directly amidships made Barge W-102 unseaworthy, or if Avondale's failure to add a cleat or bitt amidships was a negligent omission, Avondale may still successfully defend against any liability because East-West breached its warranty of workmanlike performance. In the usual case, the injured plaintiff (Stevens) would have recovered against the barge owner (Avondale) and the barge owner would be seeking indemnity from plantiff's employer (East-West). In this case, since East-West is standing in Stevens' stead, Avondale is using its indemnity rights as a defense.

In summarizing development of the warranty of workmanlike performance, the Second Circuit stated:

The shipowner, relying on the stevedore's expertise,

> entrusts loading operations to its supervision and control, thereby putting the stevedore in the best position to prevent accidents. The same reasoning has been applied to "dead" tows, ***Tebbs v. Baker-Whiteley Towing Co.***, 407 F.2d 1055, 1058 (4th Cir. 1969) . . . . Therefore, we find the crucial elements of *Ryan* [***Stevedoring Co. v. Pan-Atlantic Steamship Corp.***, 350 U.S. 124, 76 S.Ct. 232 [100 L.Ed. 133] (1956)] to be as follows: a shipowner, relying on the expertise of another party (the contractor), enters into a contract whereby the contractor agrees to perform services without supervision or control by the shipowner, the improper, unsafe or incompetent execution of such services would foreseeably render the vessel unseaworthy or bring into play a pre-existing unseaworthy condition; and the shipowner would thereby be exposed to liability regardless of fault.

Fairmont Shipping Corp. v. Chevron International Oil Co., 511 F.2d 1252, 1257-58 (2d Cir.), ***cert. denied***, 423 U.S. 838, 96 S.Ct. 66, 46 L.Ed.2d 57 (1975) (footnotes omitted).[7] In the instant case, Avondale, relying on the DELTA DAWN crew's expertise, entrusted towing operations to its supervision and control, thereby putting the crew in the best position to prevent the accident. However, the district court held that Avondale was not entitled to indemnification or contribution on two grounds. First, the court held that the DELTA DAWN had contracted to provide towing services, and at the time of the accident, the tug did not yet have Barge W-102 in tow. Second, the court found that Stevens' actions did not render the barge unseaworthy nor did his actions bring a preexisting unseaworthy condition into play.

[7] The 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.S. §901 et seq., have abrogated the *Ryan* doctrine as it applies to stevedores. 33 U.S.C. § 905(b). The pertinent legislative history on this point provides as follows:

> The committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine.

H.R.Rep.No. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4704. However, the courts have extended the *Ryan* doctrine to non-stevedore marine contracts where the seaworthiness doctrine may still apply, as it would in the instant case. *See* Section III, *supra*. For cases extending the *Ryan* doctrine to other marine contracts, see *Fairmont Shipping Corp. v. Chevron International Oil Co.*, 511 F.2d 1252 (2d Cir.), *cert. denied*, 423 U.S. 838, 96 S.Ct. 66, 46 L.Ed.2d 57 (1975) (towage contract); *Parfait v. Jahncke Service, Inc.*, 484 F.2d 296 (5th Cir. 1973), *cert. denied*, 415 U.S. 957, 94 S.Ct. 1485, 39 L.Ed.2d 572 (1974) (diesel dredge repair contract); *Whisenant v. Brewster-Battle Offshore Co.*, 446 F.2d 394 (5th Cir. 1971) (drill pipe testing contract); *Tebbs v. Baker-Whiteley*, 407 F.2d 1055 (4th Cir. 1969) (towage contract); *Lusich v. Bloomfield Steamship Co.*, 355 F.2d 770 (5th Cir. 1966) (ship repair contract); *James McWilliams Blue Line, Inc. v. Esso Standard Oil Co.*, 245 F.2d 84 (2d Cir. 1957) (towage contract). Thus, the 1972 amendments do not affect the applicability of the warranty of workmanlike performance to other contractors. *See Fairmont Shipping Corp. v. Chevron International Oil Co., supra*, at 1258 n. 10; *Leckelt v. Superior Oil Co.*, 608 F.2d 592, 593 n.1 (5th Cir. 1979). In addition, although the towage cases cited above involved property damage, the cases in general make no distinction between actions for indemnity against liability for personal injuries or for property damage. Actions for indemnity may be maintained when a towage contractor breaches its warranty of workmanlike performance resulting in personal injury. *See Dunbar v. Henry DuBois' Sons Co.*, 275 F.2d 304 (2d Cir.), *cert. denied*, 364 U.S. 815, 81 S.Ct. 45, 5 L.Ed.2d 46 (1960) (shipowner may sue towage contractor under breach of warranty theory for indemnity in wrongful death action).

The district court drew an erroneous conclusion from the fact that the DELTA DAWN did not yet have the barge in tow. The court failed to give proper consideration to the fact that at the time of the accident the tug was making fast to the barge. The DELTA DAWN's warranty of workmanlike performance extended to all towing operations including preparations necessary and incident to the actual moving of the barge. In ***Tebbs v. Baker-Whiteley Towing Co.***, 407 F.2d 1055 (4th Cir. 1969), a case with somewhat analogous facts, a tug contracted to provide towing services to a barge. As the tug was attempting to make fast to the barge, it bumped the vessel. The bump caused the barge's defective mooring line to sever and drove the barge into a nearby yacht. The Fourth Circuit held that the tug breached its warranty of workmanlike performance and the barge owner was entitled to indemnity. ***See also Fairmont Shipping Corp. v. Chevron International Oil Co.***, ***supra*** at 1260-62 (in contract to provide towing services, failure to reach vessel in time to tow was breach of warranty). Stevens' failure to tie up to the available bitts and cleats, or the crane leg, while waiting to tow the barge, were all part of the towing operation.

Second, Stevens had been warned by an Avondale employee, his own boss, and the crane operator not to tie up to this obviously inadequate stop plate. The crane operator even explained why the stop plate was not adequate. Staunch bitts were available on the barge, as the photographs in evidence demonstrate. The barge had been successfully hip-towed by tying onto the crane leg and had been towed in other fashions. The accident occured only by Stevens' insistence on using the inadequate stop plate.

East-West makes a final argument that breach of the warranty of workmanlike performance entitles shipowners to indemnity only if they are not themselves guilty of negligence. However, the Supreme Court and the circuit courts have recognized that a negligent shipowner may still be entitled to indemnity. ***Weyerhaeuser Steamship Co. v. Nacierma Operating Co.,*** 355 U.S. 563, 567-68, 78 S.Ct. 438, 441, 2 L.Ed.2d 491 (1958); ***Commercial Union Insurance Co. v. M/V BILL ANDREWS,*** 624 F.2d 643, 647 (5th Cir. 1980); ***Fairmont Shipping Corp. v. Chevron International Oil Co., supra*** at 1260; ***Tebbs v. Baker-Whiteley Towing Co., supra*** at 1059. Avondale's failure to add a cleat or bitt not called for in the barge's blueprints did not prevent the contractor from doing a workmanlike job and thus does not bar indemnity.

VI. CONCLUSION

The district court's finding that bitts and cleats on the river side of Barge W-102 were missing is clearly erroneous. A finding of unseaworthiness or negligence based on this finding must therefore be reversed. In addition, if the absence of an additional bitt or cleat directly amidships rendered Barge W-102 unseaworthy and Avondale negligent, the East-West tug crew's breach of their warranty of workmanlike performance nevertheless entitled Avondale to prevail in this case.

REVERSED.

APPENDIX B

Robert STEVENS,

Plaintiff,

v.

EAST-WEST TOWING COMPANY, INC.,
Avondale Shipyards, Inc.,
Vanguard Insurance, Central Marine Services, Inc.,

Defendants.

Civ. A. No. 74-2879.

United States District Court,
E.D. Louisiana.

April 23, 1979.

Suit was brought by injured tug employee for injuries sustained against his employer, bareboat charterer, and barge owner. After employer settled with injured employee, the District Court, Cassibry, J., held that: (1) barge owner was not liable to employer because of bareboat charter agreement between owner and charterer, resulting in charterer's ownership pro hac vice for term of charter; (2) barge, which was missing bitts and cleats, was unseaworthy; (3) charterer's failure to remedy situation resulted in continuing negligent act, and (4) employer, which was also negligent under principles of respondent superior, was entitled to recover one half of its settlement from charterer.

Judgment for employer.

1. Indemnity 13.2(7)

Barge owner was not liable to employer, which had settled employee's suit for injuries under the Jones Act, because of bareboat charter agreement between owner and charterer, which resulted in charterer's ownership of barge pro hac vice for term of charter. Jones Act, 46 U.S.C.A. § 688; 28 U.S.C.A. § 1333.

2. Towage 19

In light of testimony of disinterested party that there was only one bitt or timber head on barge, and that other bitts on barge had pulled off due to their poor condition, barge was unseaworthy for purposes of injury suit which was brought by injured tug employee and in which employer sought to recover from barge charterer the amount of its settlement with employee.

3. Towage 19

Barge owner does not have duty to provide the best equipment, but does have duty to provide equipment necessary to perform assigned task, and equipment must be sufficient to withstand forces likely to be incurred.

4. Towage 19

Barge owner must privide vessel that is reasonably fit for its intended use; this duty to provide seaworthy vessel requires that vessel, its gear, appurtenances and operation must be reasonably safe.

5. Towage 19

Failure of bareboat charterer to remedy situation resulted in continuing negligent act with respect to lack of necessary bitts and cleats on barge, thus rendering charterer liable to employer as assignee for continuing negligence with respect to injuries sustained by tug employee.

6. Shipping 208

Bareboat charterer, which through its employee had knowledge of missing bitts and cleats on barge, could not limit its liability to value of barge with respect to injuries sustained by tug employee where scope of authority of its employee, a ship fitter foreman, was broad enough that his privity or knowledge as to unseaworthiness of barge was in law that of charterer.

7. Negligence 2

Failure to investigate or to observe what is around oneself every day constitutes negligent ignorance.

8. Towage 19

Since injured tug employee could have elected to make large bareboat charterer bear its share of damages caused by its negligence, employer, which had settled employee's personal injury claims, would be accorded the same right and last clear chance doctrine would not be applied to relieve charterer from liability on theory that employer had last clear chance to avoid accident. Jones Act, 46 U.S.C.A. § 688; 28 U.S.C.A. § 1333.

9. Towage 19

Where actions of tug employee did not render barge unseaworthy but, rather, because of missing bitts and cleats, vessel was unseaworthy prior to any action on employee's part, and his actions did not bring into play preexisting condition with respect to missing bitts and cleats, which did not constitute a latent defect, barge bareboat charterer could not avoid liability for its negligence by asserting employer's sole liability for employee's injuries because of alleged breach of warranty of workmanlike performance, based on assertion that barge could have been successfully towed by making use of cleats still standing.

10. Indemnity 13.3

Employer, which through tug captain was aware of dangerous situation caused by tug employee's securing line to stop plate on barge, and which did not insure that danger would be averted, was negligent under principles of respondeat superior and thus, since its omissions as well as omissions of barge charterer were necessary antecedents to tug employee's injury, was entitled to recover from charterer only one half of amount of its settlement with injured employee based on unseaworthiness of barge and charterer's negligence.

11. Contribution 7

Considering injuries sustained by tug employee, who was permanently blinded in right eye and suffered facial deformity, as well as some memory loss, cost of medical care to date and costs he might incur in future as result of accident, combined with his age and inability to work in

same trade or capacity, $200,000 settlement by his employer under the Jones Act was not excessive, and thus did not warrant reduction in amount of contribution owed employer as employee's assignee by barge bareboat charterer as result of barge's unseaworthiness and charterer's negligence. Jones Act, 46 U.S.C.A. § 1333.

Robert S. Cooper, Jr., Baton Rouge, La. for plaintiff.

Winston E. Rice, Richmond M. Eustis, New Orleans, La. for defendant East-West Towing Co., Inc.

John O. Charrier, Jr., New Orleans, La., for defendant Avondale Shipyards, Inc. and Third-Party Defendant Central Marine Services, Inc.

CASSIBRY, District Judge:

The plaintiff, Robert Stevens, brought suit for personal injuries, allegedly sustained on February 4, 1974, against East-West Towing Company (East-West), his employer, under the Jones Act, 46 U.S.C. § 688, against Avondale Shipyards Incorporated (Avondale), bareboat charterer of Barge W-102, and Central Marine Service Company (Central Marine), the owner of the barge, under general admiralty jurisdiction, 28 U.S.C.A. § 1333. East-West settled with the plaintiff for $200,000 and an assignment of his claim against Avondale. Before the court are the remaining ancillary third party actions for indemnification and contribution among the defendants.

Robert Stevens was employed by East-West as a wheel-

man aboard its tug the M/V DELTA DAWN, which was under oral contract to move barges for Avondale. Among the barges to be moved was Barge W-102, which had been bareboat chartered by Central Marine to Avondale since January 1, 1971. On the day of the accident, the barge was moored next to the drilling rig ST. LOUIS, then under construction.

On the morning of February 4, 1974, the DELTA DAWN was called upon to move Barge W-102. The barge was missing a number of bitts and cleats, including the one amidships which was normally necessary in order for a tug to perform a "hip" tow. However, the barge had been towed on the hip previously by the DELTA DAWN by tieing the bow line either to the leg of a crane secured to the deck of the barge, or tieing to a metal, tackwelded stop plate about two inches wide, ten inches long and one-half inch thick on the leg of the crane. The crew of the DELTA DAWN had been warned by Joseph Lynch, the operator of the crane on the barge and employed by the crane owner Phillips Brothers, that the stop plate was not strong.

On the morning of the accident, Stevens secured the bow line to the stop plate. Before the stern line could be secured, the river caught the tug and the bow line pulled taut causing the stop plate to break loose and strike the plaintiff on the head. As a result of the accident, Stevens is permanently blinded in his right eye and suffers a facial deformity. Further, at the time of the accident, there appears to have been some brain damage and plaintiff continues to suffer memory loss.

According to the deposition testimony of Paul H. Verdin, Captain of the vessel, and Joseph Rivet, the deckhand, the tug had only tied up to await further instructions from Avondale as to where to move the barge. They both stated in their depositions that the tug was not yet preparing for the tow. Stevens asserted in his deposition that the lines securing the barge to the rig were still intact, so he knew they were not going to move the barge at that time.

Assuming their liability to Stevens to be certain under the Jones Act, East-West settled plaintiff's claim against them for $200,000.00 and an assignment of his claim against Avondale and Central Marine. East-West now seeks indemnification from Avondale and Central Marine alleging that the unseaworthiness of the barge was the sole cause of Stevens' injuries. If East-West is found to have been negligent, it asks, in the alternative, for contribution from Avondale and Central Marine on account of the unseaworthiness.

Avondale denies the unseaworthiness of the barge, and claims that even if necessary bitts and cleats were missing, East-West is solely liable either because they had the last clear chance to avoid the accident, or they breached the warranty of workmanlike services, or they breached the duty of a tug to its tow. Avondale claims, in the alternative, if they are found negligent, indemnification or contribution from East-West on these same grounds. Avondale also alleges a right to limit its liability to the value of the barge. Central Marine denies all liability because of the bareboat charter to Avondale.

[1] Defendant Central Marine is not liable to East-West because of the bareboat charter agreement between Central Marine and Avondale, which results in Avondale's ownership pro hac vice for the term of the charter. ***Reed v. United States,*** 78 U.S. (11 Wall.) 591, 20 L.Ed. 220; ***Leary v. United States,*** 81 U.S. (14 Wall.) 607, 20 L.Ed. 756; ***Haskins v. Point Towing Co.,*** 421 F.2d 532 (3rd Cir. 1970).

[2] I find Avondale's Barge W-102 was unseaworthy. Although the evidence concerning the exact number of bitts and cleats still in place on the barge at the time of the accident is disputed, the single disinterested party, Lynch, the crane operator, stated in his deposition that there was only one bitt (or timberhead) on the barge, and that he had seen other bitts on the barge pulled off due to their poor condition.

[3, 4] A barge owner does not have a duty to provide the best equipment, but he does have a duty to provide the equipment necessary to perform the assigned task, and that equipment must be sufficient to withstand the forces likely to be incurred. ***Walker v. Harris,*** 335 F.2d 185 (5th Cir. 1964). The owner must provide a vessel that is reasonably fit for its intended use. This duty to provide a seaworthy vessel requires that the vessel, its gear, appurtenances and operation must be reasonably safe. ***Drachenberg v. Canal Barge Co., Inc.,*** 571 F.2d 912 (5th Cir. 1978). "A vessel's condition of unseaworthiness might arise from any number of circumstances. Her gear might be defective, her appurtenances in disrepair." ***Usner v. Luckenbach,*** 400 U.S. 494, 91 S.Ct. 514, 27 L.Ed.2d 562 (1971). In the

case at bar, Avondale's barge was not reasonably fitted for its intended use as not only were necessary appurtenances, i.e. the bitts and cleats, unsafe and in disrepair, but were absent. See Alex L. Parks, J.D., The Law of Tug, Tow and Pilotage, Chapter VII (1971).

[5] I find that Avondale was also negligent. Avondale's failure to remedy the situation resulted in a continuing negligent act. See 1 Martin J. Norris, The Law of Maritime Personal Injuries, § 122 (3rd ed. 1975). Although the unseaworthiness results in liability for Avondale, according to the rule in ***Horton & Horton, Inc. v. T/S J. E. DYER***, 428 F.2d 1131 (5th Cir. 1970), the owner is also liable for continuing negligence when, once notified, he fails to remedy the condition which renders the vessel unseaworthy.

[6] Because of this knowledge, I find that Avondale is not allowed to limit its liability to the value of the barge. Avondale, through its employee, Douglas Adams, shipfitter foreman, had knowledge of the missing bitts and cleats. Further, Adams' scope of authority was broad enough that his privity or knowledge as to the unseaworthiness of the barge was in law that of Avondale. ***Coleman v. Jahncke Service, Inc.***, 341 F.2d 956, rehearing denied 348 F.2d 868 (5th Cir. 1965); ***In re Converse***, 61 F.2d 777 (2d Cir. 1932).

[7] Although Avondale cites Adams' deposition to the effect that he did not know if any bitts and cleats were missing, his previous statements therein indicate that he should have known. In his deposition, Adams states that he ordered Stevens not to tie up to the saddle used to secure

the crane to the deck of the barge. Adams continues that Stevens told him there were no other places on the barge to which he could secure the lines. After this exchange, if Adams did not know of the condition, he should have known, and further, he had an affirmative duty to find out. Failing to investigate or to observe what was around him every day constitutes negligent ignorance. William L. Prosser, Handbook of the Law of Torts, § 32 (4th ed. 1971). Finally, such negligence must be imputed to Avondale under familiar principles of respondeat superior. ***Spinks v. Chevron Oil Co.***, 507 F.2d 216, 222 (5th Cir. 1975).

Avondale claims it should be relieved from any liability on account of its negligence because East-West had the last clear chance to avoid the accident. "In determining causation in maritime matters, the applicability of such doctrines as last clear chance and the interruption of negligence by a subsequent intervening negligence is questionable." ***Horton*** at 1135. Admiralty courts, as civil law courts, have not had to deal with acceptable methods of escaping the harsh rule of contributory negligence which bars recovery. "The shift in thinking, reflected in comparative negligence statutes, toward evaluating the conduct of the parties and weighing their proportionate share in the accident . . . is now leaving little elbow room for the last clear chance doctrine." ***Cenac Towing Co. v. Richmond***, 265 F.2d 466, 470 (5th Cir. 1959).

[8] Therefore, in admiralty, none of the traditional policy reasons for applying the doctrine exists. In fact, had Stevens pursued his claim, either or both of the defendants in the original action could have been held responsible for all or part of the damages, despite any contributory negligence

on Stevens' part. Since plaintiff could have elected to make Avondale bear its share of the damages caused by its negligence, I see no reason why East-West should not be accorded the same right. ***Cooper Stevedoring Co. v. Fritz Kepke, et al.***, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974).

In addition, counsel for Avondale has not cited any case in which the doctrine of last clear chance was applied to a maritime personal injury action. The cases cited by Avondale are either collision or sinking cases and cannot be analogized to the present suit. ***Chemical Transporter, Inc. v. M. Turecamo, Inc.***, 290 F.2d 496 (2d Cir. 1961); ***The Perth Amboy No. 4***, 135 F.2d 404 (2d Cir. 1943); ***Southwestern Sugar & Molasses Co. v. River Terminals Corp.***, 153 F.Supp. 923 (E.D.La.1957); ***Houma Well Service, Inc. v. Tug CAPT. O'BRIEN***, 312 F.Supp. 257 (E.D.La.1970).

[9] Avondale further seeks to avoid liability for its negligence by asserting East-West's sole liability because of an alleged breach of a warranty of workmanlike performance. Avondale asserts that the barge could have been successfully towed by putting out face wires, by assuming a different position along the starboard side and thereby making use of cleats allegedly still standing, by running a line to the alleged cleat 20 to 30 feet above her bow, or by simply putting the line around the leg of the crane. While this may be true as to the execution of a successful tow, all three persons on the tug stated in their depositions that they were not towing the barge at the time of the accident, and that, in fact, the barge was still tied to the rig when the accident occurred. Further, in support of this contention, Avondale

cites ***Fairmont Shipping Corp. v. Chevron International Oil Co., Inc.***, 511 F.2d 1252 (2d Cir. 1975). However, ***Fairmont, supra,*** is inapplicable to this case. The Court in ***Fairmont*** held the crucial elements in a warranty of workmanlike performance and its breach to be a contract by which a shipowner relies on the expertise of another to perform services without his supervision and control; and the improper, unsafe or incompetent execution of those services which would foreseeably render the vessel unseaworthy or bring into play a pre-existing condition, thereby exposing the shipowner to liability. In the instant case, the actions of Stevens did not render the vessel unseaworthy. Because of the missing bitts and cleats, the vessel was unseaworthy prior to any action on the plaintiff's part. Further, his actions did not bring into play the pre-existing condition. The missing bitts and cleats did not constitute a latent defect.

Avondale finally alleges, in order to avoid liability for its negligence, East-West breached the duty of a tug to its tow to exercise reasonable care and maritime skill. Although this duty is not necessarily lessened by the fact that the tow was unseaworthy at the inception of a voyage, the courts have found a tug not liable for such a reach when the bitt on a tow pulled out, PERSEVERANCE—VIOLETTE, 1929 A.M.C. 159 (E.D.N.Y.), or when the bitt was rotten, CONWAY NO. 20—PORTER, 1930 A.M.C. 2013 (E.D.N.Y.). In the case at bar, the bitts neither pulled out nor were they rotten. Rather, they were absent.

[10] However, East-West was also negligent under the principles of respondeat superior. As the Court in ***Spinks***

at 222, stated, "At least some of the negligence must be assigned to [East-West's employee, Capt. Paul F. Verdin], who was aware of the dangerous condition and [Stevens'] working methods." Although it is disputed whether the tug was merely tieing up to await further instruction or preparing for the tow, Captain Verdin's deposition indicates that he was aware of the dangerous situation caused by Stevens securing the line to the stop plate. Verdin stated in his deposition that he ordered Stevens to untie the line, but admitted that, although he gave the order and was cognizant of the danger, Stevens' back was turned and Verdin never saw the plaintiff acknowledge the order. Despite this, Verdin made no further attempt to insure that the line was untied and the danger averted.

In the present suit, both Avondale and East-West were guilty of negligence which concurred to cause the injury. Because of the maritime stylization of seamen as wards of the Court, admiralty law has assigned a high standard of duty to employers and shipowners. As a result of this strong policy, actual cause analysis is singularly appropriate in maritime tort. ***Spinks, supra.*** Under a cause-in-fact analysis, it is clear that the omissions of Avondale as well as the acts of East-West were necessary antecedents to the injury, both contributing to the result that without them would not have occurred.

It would be difficult based on the depositions to evaluate the responsibility between East-West on the one hand and Avondale on the other. The unseaworthiness of the barge and the negligence of both tortfeasors were necessary to the occurrence, therefore the liability will be divided equally between them. The Supreme Court in the ***Cooper*** case,

417 U.S. at p. 109, 94 S.Ct. 2174, affirmed such a division by a district court when the court found to do otherwise would be difficult and arbitrary.

[11] Considering the plaintiff's injuries, the cost of his medical care to date, and the costs he may incur in the future as a result of the accident, combined with his age and inability to work in the same trade or capacity, the settlement was not excessive, thereby warranting a reduction in the amount of contribution owed by Avondale. As long ago as 1958, a plaintiff suing under the Federal Employers Liability Act for the loss of an eye was awarded $100,000. ***Missouri-Kansas-Texas Railroad Co. of Texas v. Bush***, Tex.Civ.App., 310 S.W.2d 404, cert. den. 358 U.S. 827, 79 S.Ct. 45, 3 L.Ed.2d 67 (1958).

Finally settlement value of an injury depends on the degree of certainty of the imposition of liability. In the instance case, the court in deciding the questions of indemnification and contribution, has had to reach conclusions of law concerning the respective liability of the parties. Accordingly, in view of the resolution of these issues, it is evident that the parties would have been liable to the plaintiff and it is not unreasonable to assume that a jury would have awarded the plaintiff an even greater sum.

East-West is entitled to recover from Avondale the amount of $100,000.00, plus one-half of the costs. Recovery of East-West against Central Marine is denied.

The Clerk shall enter judgment accordingly.

APPENDIX C

In The United States Court of Appeals
for the Fifth Circuit

Unit A

No. 79-2875

Robert STEVENS,

Plaintiff,

v.

EAST-WEST TOWING COMPANY, INC., ET AL,

Defendants,

AVONDALE SHIPYARDS, INC.,

Defendant-Appellant, Cross-Appellee,

v.

EAST-WEST TOWING CO., INC.,
and VANGUARD INSURANCE,

Defendants-Appellees, Cross-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (Opinion 7/6/81, 5 Cir. 1981 _____ F.2d _____).

August 24, 1981

Before GOLDBERG, AINSWORTH and RUBIN, Circuit Judges.

PER CURIAM:

X The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

CLERK'S NOTE:
See Rule 41 FRAP and Local Rule 17 for stay of the mandate.

Opposition

Office - Supreme Court, U.S.
FILED
NOV 30 1981
ALEXANDER L. STEVAS
CLERK

NO. 81-764

In the Supreme Court of the United States

OCTOBER TERM, 1981

EAST—WEST TOWING COMPANY, INC. AND VANGUARD INSURANCE COMPANY,
Petitioner

versus

AVONDALE SHIPYARDS, INC.
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No. 81-764

EAST-WEST TOWING COMPANY, INC. AND VANGUARD INSURANCE COMPANY,

Petitioner

versus

AVONDALE SHIPYARDS, INC.,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NOW COMES Avondale Shipyards, Inc., respondent in the captioned matter, and submits that petitioner's prayer for a writ of certiorari should be denied for the reason that petitioner's appeal is both

frivolous and of no consequence to the ultimate disposition of this matter.

ARGUMENT

Respondent submits it is unnecessary for this Honorable Court to grant petitioner a writ of certiorari to review the opinion of the Court of Appeals for the Fifth Circuit in *Stevens v. East-West Towing Company, Inc.*, 649 F.2d 1104 (5th Cir. 1981), for the reason that petitioner seeks to appeal mere dicta in appellate court's opinion. Accordingly, the prayer for a writ of certiorari should be denied.

In the captioned matter, the United States District Court for the Eastern District of Louisiana held respondent liable for contribution to petitioner, based on the court's finding that the Barge W-102 was unseaworthy and that respondent was negligent. *Stevens v. East-West Towing Company, Inc.*, 470 F. Supp. 484 (E.D. La. 1979). The United States Court of Appeals for the Fifth Circuit reversed that finding as "clearly erroneous", and held respondent not liable for contribution. *Stevens v. East-West Towing Company, Inc.*, 649 F.2d 1104, 1105 (5th Cir. 1981). However, the court went on to say in dicta:

> Alternatively, even if Avondale is negligent or its barge unseaworthy, we hold that Avondale has asserted a complete defense against East-West: namely, that East-West breached its warranty of workmanlike performance that it owed Avondale. 649 F.2d at 1105.

Petitioner now prays for a writ of certiorari to overturn this dicta.

A writ of certiorari in this matter is both unnecessary and a complete waste of time. The Court of Appeals held respondent not negligent and its barge seaworthy, reversing the District Court's findings to the contrary. The granting of a writ of certiorari will not disturb this holding by the Court of Appeals, even if this Honorable Court goes on to decide the merits of the question presented in petitioner's favor. Whether petitioner owed respondent a warranty of workmanlike performance, which is precisely what petition requests this Honorable Court to decide, does not alter the disposition of this case. The Court of Appeal's judgment will remain the same —— respondent still will not owe petitioner contribution.

Thus, a writ of certiorari in the captioned matter would be an exercise in futility and a complete

waste of this Honorable Court's time. Accordingly, respondent submits that this Honorable Court deny petitioner's prayer for a writ of certiorari to the U.S. Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that three copies of the foregoing petition were served on Winston Edward Rice, Esquire, of New Orleans, Louisiana, this 30th day of November, 1981, by mailing same as required by Rule 33-1 of this court. New Orleans, November 30th, 1981.

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John O. Charrier, Jr.